Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77 - 830

EDWIN J. O'CONNOR,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	3
HISTORY OF THE CASE	3
HISTORY OF THE PROCEEDINGS . . .	5
REASONS FOR GRANTING THE WRIT . .	6
I. An Affidavit For Search Warrant Based On Information From An Unnamed Informant That Is Devoid Of Any Description Of The Interior Of The Premises Or Of A Statement That Controlled Substances Were Seen Therein, Or Of The Date When Seen, or Of The Procedures Whereby Such Substances Are Transported In And Out Of The Premises Does Not Provide Probable Cause For The Search Of A Residence	6
II. A Magistrate's Record Of Supplementary Oral Information Which Consists Solely Of His Recollection At A Suppression Hearing That There Was A Second Unnamed Informant Is Not Sufficient To Salvage An Inadequate Written Affidavit For Search Warrant	8

	Page
CONCLUSION	11
APPENDICES:	
EXHIBIT A Opinion of the Court of Appeals	2,5
EXHIBIT B Order of the Court Of Appeals Denying Motion For Reconsideration	2
EXHIBIT C Order of the Supreme Court Of Washington Denying Petition For Review	2
EXHIBIT D Affidavit (Complaint) For Search Warrant	3

TABLE OF CITATIONS

CASES:

Aguilar v. Texas (1964) 378 U.S. 108	6,7,8
Christofferson v. Washington (1969) 393 U.S. 1090	9
City of Tacoma v. Duane (1976) 15 Wash.App. 698, 552 P.2d 1068	11
Jones v. United States (1960) 362 U.S. 257	7
Spinelli v. United States (1969) 393 U.S. 410	6,8

	Page
State v. Chakos (1968) 74 Wash.2d 154, 443 P.2d 815	9
State v. Fields (1975) 85 Wash.2d 126, 530 P.2d 284	10
State v. Malbeck (1966) 69 Wash.2d 695, 419 P.2d 805	9
State v. Walcott (1967) 72 Wash.2d 959, 435 P.2d 994	9,10
United States ex rel Gaugler v. Brierly (3rd Cir. 1973) 477 F.2d 516	11
United States v. DiMuro (1st Cir. 1976) 540 F.2d 503	7
United States v. Harris (1971) 403 U.S. 573	7
United States v. Hill (5th Cir. 1974) 500 F.2d 315	11
United States v. Larkin (9th Cir. 1974) 510 F.2d 13	8
United States v. Myers (D.C. Cir. 1976) 538 F.2d 424	8
United States v. Tellis (6th Cir. 1976) 538 F.2d 1254	7

	Page
STATUTES:	
28 U.S.C. §1257	2
COURT RULES:	
State of Washington Justice Court Criminal Rule 2.10 [Text in full at 82 Wash.2d 1178]	10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77 -

EDWIN J. O'CONNOR,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

The Petitioner, EDWIN J. O'CONNOR respectfully prays that a Writ Of Certiorari issue to the Court of Appeals, Division Two, of the State of Washington to review the decision affirming the judgment of conviction in the Superior Court for Thurston County.

Judgment was entered, following a jury verdict of guilty, on April 14, 1975.

The Court of Appeals, Division Two, affirmed the judgment by its unpublished opinion filed February 22, 1977. A timely Motion For Reconsideration was filed March 11, 1977 and was denied by order dated March 23, 1977. A timely Petition For Reconsideration To The Supreme Court, State of Washington, was filed on April 11, 1977; the Petition was denied Sep-

tember 29, 1977.

OPINION BELOW

The opinion of the Court of Appeals of the State of Washington appears as Appendix Exhibit A hereto. The order of the Court of Appeals denying the Motion For Reconsideration appears as Appendix Exhibit B hereto. The order of the Supreme Court of the State of Washington denying the Petition For Review appears as Appendix Exhibit C hereto.

JURISDICTION

The denial of Petitioner's Petition For Review To The Supreme Court of the State of Washington was entered September 29, 1977. This Petition has been filed within 90 days thereof. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I

Is there probable cause for issuance of a warrant to search a residence for controlled substances in an affidavit based on information from an unnamed informant that provides no personal and recent information regarding the premises to be searched?

II

When oral information is required to supplement an affidavit for a search warrant does the testimony of the issuing magistrate at a suppression hearing

two months later, recalling only that a second, unnamed informant was mentioned, provide a sufficient basis to validate an otherwise insufficient affidavit?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provisions involved is the Fourth Amendment, made applicable to the states by the Fourteenth, which provides:

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

HISTORY OF THE CASE

On the evening of June 27, 1974 Officer William Strand of the Thurston County Sheriff's Department, State of Washington, prepared an affidavit for a warrant to search Petitioner's residence and pickup truck for controlled substances. Appendix Exhibit D. The affidavit contained only the following statement:

> *"Information was transmitted to this officer by a confidential and reliable informant that he personally observed a controlled substance that was*

> *removed from the above named residence. At the time an estimate of perhaps a thousand or more pills were in the residence. The informant is aquainted with drugs both pharmaceutical-type and illicit drugs. The informant is licensed as a pharmacist. The controlled substance is identified as methanphetamine (Criss-Cross Speed) Further it was noted that the suspect took a package that appeared to be some of the same type substance to his vehicle. The informant has in the past aided in the investigation of other cases that have resulted in the arrest and conviction of the persons involved in the cases. The informant is still being used as an informant and will be used in the future in drug abuse cases."*

Officer Strand consulted with the Assistant District Attorney, Mr. Schaller, Jr., who pointed out deficiencies in the affidavit which would require supplementary, oral information to the magistrate. That evening Officer Strand sought out and located Judge Pro Tem Ward Rathbone at a local restaurant and bar. Judge Rathbone was paged and the two men went to the cash register area where the affidavit was read and supplementary oral information given. There were no witnesses to the conversation. No court reporter was present. No recording was made. No notes of the conversation were made at the time, or thereafter. Judge

Rathbone signed the Warrant.

That same night, at 11:30 p.m., a search was conducted at Petitioner's residence. A quantity of pills was found in the front room of the apartment and in the kitchen cabinet. Analysis by a forensic chemist revealed that the contents of some of the pills were amphetamines.

HISTORY OF THE PROCEEDINGS

Petitioner was charged by information with two counts of possession and one count of delivery of amphetamines. At a suppression hearing held August 28, 1974 Judge Rathbone testified that just prior to signing the search warrant he swore Officer Strand under oath and the Officer told him there was another informant in addition to the one referred to in the affidavit. Judge Rathbone did not recall any other specific information conveyed orally. Officer Strand testified that he told Mr. Rathbone the information from the unnamed informant had been received at 6:00 p.m. that same day, and that there was a second informant but he did not wish to include that second informant in the affidavit. The Trial Court concluded that probable cause existed for the issuance of the search warrant. Testimony regarding the amphetamines seized in the search was central to the prosecution's case. The jury returned guilty verdicts on all three counts.

The Court of Appeals in its unpublished opinion (Appendix Exhibit A) sidestepped the major issue of the use of

oral information to supplement the affidavit by finding that the affidavit itself established probable cause.

REASONS FOR GRANTING THE WRIT

I. AN AFFIDAVIT FOR SEARCH WARRANT, BASED ON INFORMATION FROM AN UNNAMED INFORMANT, THAT IS DEVOID OF ANY DESCRIPTION OF THE INTERIOR OF THE PREMISES, OR OF A STATEMENT THAT CONTROLLED SUBSTANCES WERE THERE OR OF THE PROCEDURES WHEREBY SUCH SUBSTANCES ARE TRANSPORTED IN AND OUT OF THE PREMISES, DOES NOT PROVIDE PROBABLE CAUSE FOR THE SEARCH OF A RESIDENCE

The Fourth Amendment to the Constitution requires that probable cause be shown before a search warrant is issued. When an affidavit for search warrant is based on hearsay it must satisfy the two-pronged test of Aguilar v. Texas (1964) 378 U.S. 108. First, the magistrate must be informed of some of the underlying circumstances on which the informant based his conviction that drugs were where he claimed they were. Second, the officer must state the facts from which he concluded that the informant was reliable. If the affidavit appears insufficient at first glance because either of these criteria has not been met, probable cause may still be established if the affidavit recites corroborating evidence which buttresses either the informant's reliability or the reliability of his information. Spinelli v. United States (1964) 393 U.S. 410.

In the instant case, reliability of one of the informants only was established in the affidavit. That unnamed informant

was identified as a licensed pharmacist, familiar with illicit drugs, who had aided in previous investigations leading to arrest and conviction. Nothing is known about the unidentified informant who was mentioned in the course of the suppression hearing.

It is clear from case law that the other prong of the test requires personal and recent observations of the premises to be searched. For example, an affidavit cited with approval by the Court in Aguilar appears in Jones v. United States (1960) 362 U.S. 257. The Jones informant had on many occasions been at the subject apartment and purchased narcotics there from the tenant, most recently on the day before the affidavit was made. He knew the tenant kept the narcotics in one of the following locations when not on his person: under a pillow, on a dresser or on a window ledge of the apartment.

In United States v. Harris (1971) 403 U.S. 573 the adequate affidavit stated that informant had purchased illegal whiskey within the residence described for a period of more than 2 years, most recently within the past 2 weeks prior to the date of the affidavit, and he knew of a person who bought illegal whiskey there within the past 2 days.

United States v. DiMuro (1st Cir. 1976) 540 F.2d 503 is a recent illegal gambling case. According to the affidavit the informant had recently placed bets over the telephone at the location to be searched and had observed gambling records there. United States v. Tellis (6th Cir. 1976)

538 F.2d 1254 presents a minimally sufficient affidavit for a drug search: The informant had been on the premises to be searched within the past 3 days and had seen a white powder which the defendant told him was heroin.

In the instant case there are no statements of personal and recent observations of the premises to be searched. What the informant claimed to see was a controlled substance "that was removed from the above named residence." That statement is obviously ambiguous, but on a fair reading it gives no indication that the informant ever saw the drugs in question in the possession of the Petitioner or at his residence. It merely says that the controlled substance had been removed from that residence. How removed, by whom or when are questions that seek an answer in the record in vain. The attempt in the affidavit to connect the drugs to Petitioner's pickup truck is equally defective. It was noted "that the suspect took a package that appeared to be some of the same type substance to his vehicle." The statement itself is qualified; not a fact, but an inference, a guess is reported without further detail as to the package - its shape, size, color, markings, or whether it was open so that pills were visible within. Corroboration of innocuous or marginal information does not satisfy the Aguilar-Spinelli test. See United States v. Larkin (9th Cir. 1974) 510 F.2d 13, and the dissenting opinion of Leventhal, Circuit Judge, in United States v. Myers (D.C. Cir. 1976) 537 F.2d 424.

II. A MAGISTRATE'S RECORD OF SUPPLEMENTARY ORAL INFORMATION WHICH CONSISTS SOLELY OF HIS RECOLLECTION AT A SUPPRESSION HEARING THAT THERE WAS A SECOND UNNAMED INFORMANT IS NOT SUFFICIENT TO SALVAGE AN INADEQUATE WRITTEN AFFIDAVIT FOR SEARCH WARRANT

The question whether sworn oral testimony given to a state magistrate in an application for a search warrant could be considered in order to support an insufficient affidavit was presented to this Supreme Court in a Petition For Certiorari from a ruling of the Supreme Court of the State of Washington which answered the question in the affirmative in State v. Chakos (1968) 74 Wash.2d 154, 443 P.2d 815 based on that Court's prior holding in State v. Walcott (1967) 72 Wash.2d 959, 435 P.2d 994. This Supreme Court denied certiorari, over the dissent of Mr. Justice Brennan, joined in by Mr. Justice Marshall. Christofferson v. Washington (1969) 393 U.S. 1090.

The Washington decisions require that when oral testimony is taken the guarantees of a signed affidavit must have reasonable replacements. In State v. Malbeck (1966) 69 Wash.2d 695, 419 P.2d 805, the officer was sworn by the magistrate and examined under oath as follows:

> *" ... the justice read the affidavit form and then asked him questions regarding the appellant's name on the documents, as to the past reliability of the informant, as to how long the officer had dealt*

> *with the informant, ... as to the location where the stolen property was believed to be kept, and as to the informant's knowledge of the area of the (offense)."*
> 69 Wash.2d at 696, 697

Thereafter the magistrate executed an affidavit regarding his examination. Thus two additional guarantees of probable cause were provided -- an extensive oral examination and a written affidavit describing it.

In Walcott, supra, no record of the oral testimony was made at the time of the application for search warrant. However, in preparation of a suppression hearing four affidavits were obtained -- one from the magistrate, one from the deputy prosecuting attorney, one from the complaining officer, and one from another police officer -- purporting to relate in detail what was said to the magistrate.

By order dated April 18, 1973, effective July 1, 1973 the Supreme Court of the State of Washington adopted Justice Court Criminal Rule 2.10(c) which requires, in pertinent part, that if oral testimony is required in support of a search warrant affidavit, "The judge shall record a summary of any additional evidence on which he relies." The entire rule appears at 82 Wash.2d 1178. The rules enunciated by that Supreme Court for issuance of search warrants supersede the statutes on the same subject matter. State v. Fields (1975) 85 Wash.2d 126, 530 P.2d 284. This is true in particular of Justice Court Criminal Rule 2.10. City

of Tacoma v. Duane (1976) 15 Wash.App. 698, 552 P.2d 1068.

Rule 2.10(c) was in effect at the time warrant in the instant case was issued, but no recording was made of the oral testimony to Judge Rathbone; no notes were taken; no affidavits regarding that testimony were later prepared. Thus there were none of the reasonable replacements established by Washington case law and Court rule to substitute for the traditional guarantees of a complete affidavit which can later be subjected to constitutional scrutiny.

The nearly unanimous view in the federal courts is that the Fourth Amendment requires only that a defendant be given an opportunity to examine the magistrate and officers to determine the substance of the oral testimony and whether that testimony was given under oath. United States v. Hill (5th Cir. 1974) 500 F.2d 315; United States Ex Rel. Gaugler v. Brierly (4th Cir. 1973) 477 F.2d 516.

Even under this restricted, federal test the instant proceedings were insufficient since by the time of the suppression hearing the substance of the oral testimony was not remembered except for some innocuous details.

CONCLUSION

For all of the foregoing reasons the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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94109

Attorney for Petitioner

EXHIBIT A

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
EDWIN J. O'CONNOR,)
)
Appellant.)

NO. 1838-II
Division Two
Unpublished Opinion
Filed Feb 22 1977

REED, J. -- Defendant Edwin J. O'Connor appeals from his superior court convictions for: (1) possession of amphetamines with intent to deliver on June 25, 1974; (2) delivery of amphetamines on June 25, 1974, and (3) possession with intent to deliver amphetamines on June 28, 1974. We affirm.

On June 27, 1974, Detective William Strand of the Thurston County Sheriff's Department, met with a confidential and reliable informant, who told him that he had personally observed a controlled substance which had been removed from the residence of defendant O'Connor and that at that time he estimated there to be perhaps a thousand or more pills in the

residence. The informant also noted that the suspect, O'Connor, had taken a package of what appeared to be the same type substance to his vehicle. Detective Strand then typed a Complaint for Search Warrant, which contained substantially the same information he had received from the informant, and included the additional information that the informant was licensed as a pharmacist, was acquainted with both pharmaceutical and illicit drugs, had identified the controlled substance as methamphetamine ("crisscross speed"), had in the past aided in the investigation of other drug cases which resulted in convictions, and was currently being used as an informant in drug abuse cases.

After some attempts to locate a magistrate, the officer contacted District Court Judge Pro tem Ward Rathbone at a local restaurant late in the evening. Judge Rathbone administered an oath to Detective Strand, questioned him on the contents of the sworn affidavit, and concluded that there was probable cause to believe there were amphetamines in the residence of the suspect at the time. He accordingly issued a search warrant for O'Connor's residence. Detective Strand then proceeded to the suspect's address and conducted a search of the premises, finding and seizing an estimated 6,000 pills from a coffee table near the front door, and more pills from various other locations in the residence. Two suppression hearings were held, at which the existence of probable cause for issuance of the warrant was unsuccessfully attacked and the evidence was used to convict O'Connor at his subsequent trial.

The defendant has made two assignments of error, contending: (1) that the evidence should have been suppressed because (a) the affidavit for the search warrant did not satisfy constitutional standards, (b) the use of oral information to supplement the affidavit was improper, and (c) there was no justification for a nighttime search of the defendant's residence; and (2) that the jury was improperly instructed on the law of possession.

Turning to the issue of probable cause for the issuance of a search warrant, we first note that, although the affidavit is not a model of clarity, it does satisfy constitutional standards and meets the dual test of Aguilar v. Texas, 378 U.S. (1964). It sufficed to furnish probable cause to believe the pills were controlled substances; that they had been observed in the suspect's house in numbers estimated at over 1,000; and the suspect had been seen carring a package which appeared to contain some of the pills to his automobile. The affidavit also contained information from which the issuing magistrate could determine the informant was credible and reliable; he had previously aided in the investigation of cases which resulted in convictions; he was still being used as an informant; and he was a licensed pharmacist. The affidavit

clearly passes the test enunciated in State v. Harrison, 5 Wn. App. 454, 458, 488 P.2d 532 (1971).

Because we have found the affidavit established probable cause, we do not deem it necessary to address defendant's complaint that Officer Strand orally supplemented the affidavit in his discussions with the issuing magistrate. Any error arising from a failure to record and reduce to writing this supplemental information pursuant to the provisions of JCrR 2.10(c) is not prejudicial because the added information would be mere surplusage to an otherwise valid affidavit.

We find no merit in defendant's allegation that there was no justification for serving the search warrant at 11:30 at night. Detective Strand received information from the informant at 6 p.m. on June 27. He immediately typed his Complaint for Search Warrant and attempted to locate a magistrate. After several unsuccessful attempts, he finally located Judge Rathbone in a restaurant at approximately 11 p.m. Upon receiving the search warrant from the judge, he proceeded immediately to the suspect's residence and carried out the search. At the time the search was actually carried out the suspect was not even home, and the police had to be let into the residence by the

apartment manager. JCrR 2.10(c) and CrR 2.3(c) both specify that the "warrant may be served at any time" within 10 days of issuance. Moreover, it is obvious that Judge Rathbone, in signing the warrant at 11 p.m., knew that it might well be executed before daylight. There was no error in serving the warrant. See State v. Smith, 15 Wn. App. 716, 552 P.2d 1059 (1976).

Defendant has failed to preserve error with regard to his contention that the court should not have given its instructions No. 11 and 13. Defendant failed to call to the trial judge's attention the deficiencies he now urges on appeal. State v. Peterson, 73 Wn.2d 303, 438 P.2d 183 (1968); State v. Smith, 11 Wn. App. 216, 521 P.2d 1197 (1974). Nor has defendant complied with CAROA 43, which mandates that we not consider assignments directed to the sufficiency or insufficiency of instructions which are not set out in full in defendant's brief. Accordingly, even though we believe instruction No. 13 is a misstatement of the law and ought not to be given, we do not find it violates any constitutional right of the defendant in the context of this case and there is no ground for reversal.

Defendant assigns no error to the sufficiency of the evidence or the rulings of the trial court in connection with his conviction for delivering amphetamines on June 25, 1974; all assignments appear to be directed at the crimes of possession and particularly that of June 28, 1974.

The judgments are affirmed.

Pursuant to RCW 2.06.040 as amended by the Laws of 1971, ch. 41, §1, this opinion will not be published.

/s/ REED, J.

WE CONCUR:

/s/ PEARSON, J.

/s/ PETRIE, C.J.

EXHIBIT B

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

EDWIN J. O'CONNOR,

Appellant.

NO. 1838-II

ORDER DENYING MOTION
FOR RECONSIDERATION

The court has considered this motion for reconsideration and has determined that it should be denied. Accordingly, it is

ORDERED that the motion is denied.

DATED this 23rd day of March 1977.

/s/
CHIEF JUDGE

EXHIBIT C

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

EDWIN J. O'CONNOR,

Appellant.

NO. 44886 (1838-II)

ORDER DENYING PETITION
FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause.

It is ordered that the petition be and it is hereby denied.

Dated this 29th day of September, 1977.

By the Court:

16 Wn. App. 1048 /s/
Chief Justice

EXHIBIT D

THURSTON COUNTY DISTRICT JUSTICE
COURT, THURSTON COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT
(Controlled Substances)

STATE OF WASHINGTON)
) ss. NO._____
County of Thurston)

COMES NOW William Strand, who being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the State of Washington, controlled substances, as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises with Thurston County, Washington, designated and described as follows, to wit:

Apartment 102 of the El Rio Vista Apts. 1275 So. 2nd. Ave. Tumwater Wash. Apartment occupied by ED O'CONNOR also a green Datsun pickup truck with Nev. lic.

That affiant's beleif is based upon the following facts and circumstances:

Information was transmitted to this officer by a confidential and reliable informant that he personally

observed a controlled substance that was removed from the above named residence. At the time an estimate of perhaps a thousand or more pills were in the residence. The informant is acquainted with drugs both pharmaceutical type and illicit drugs. The informant is a licensed pharmacist. The controlled substance is identified as meth anphetamine (Criss-Cross Speed). Further it was noted that the suspect took a package that appeared to be some of the same type substance to his vehicle. The informant has in the past aided in the investigation of other cases that have resulted in the arrest and conviction of the persons involved in the cases. The informant will be used in the future in drug abuse cases.

/s/ William Strand

SUBSCRIBED AND SWORN TO before me this 27 day of June, 1974.

/s/ Ward Rathbone

RECEIVING OF COMPLAINT and ISSUANCE OF WARRANT APPROVED:

SMITH TROY, Prosecuting Attorney

by: /s/
Deputy Prosecuting Attorney

Supreme Court, U. S.
FILED
JAN 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-830

STATE OF WASHINGTON,

Respondent,

vs.

EDWIN J. O'CONNOR,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

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TABLE OF CONTENTS

		Page
I.	COUNTERSTATEMENT OF THE CASE .	1
	A. NATURE OF THE CASE	1
	B. RESUME OF PLEADINGS AND PROCEDURE	2
	C. STATEMENT OF FACTS	3
II.	ARGUMENT IN ANSWER TO APPELLANT	6
	A. JUDGE PRO TEM WARD RATHBONE WAS INFORMED OF SUFFICIENT UNDERLYING CIRCUMSTANCES FROM WHICH THE INFORMANT CONCLUDED THAT THE AMPHETAMINES WERE IN THE APPELLANT'S APARTMENT	6
	B. THE USE OF ORAL INFORMATION FROM DETECTIVE WILLIAM STRAND BY JUDGE PRO TEM WARD RATHBONE IN THE ISSUANCE OF THE SEARCH WARRANT WAS PERMISSIBLE	11
III.	CONCLUSION	15

APPENDICES

EXHIBIT A.
Opinion of the Court of Appeals 1a

EXHIBIT B
Order of the Court of Appeals Denying Motion for Reconsideration 6a

PAGE

EXHIBIT C
Order of the Supreme Court of Washington Denying Petition for Review 7a

EXHIBIT D.
Affidavit (Complaint) for Search Warrant 8a

TABLE OF AUTHORITIES

State v. Harrison, 5 Wn. App. 454, 488 P.2d 532 (1971) 10, 11

State v. Malbeck, 69 Wn.2d 695, 419 P.2d 805 (1966) 11, 12, 13

State v. Smyth, 7 Wn. App. 50, 49999 P.2d 63 (1972) 13

State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967) 7, 8, 9, 12, 13

JCrR 2.10(c) 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-830

STATE OF WASHINGTON

Respondent,

vs.

EDWIN J. O'CONNOR

Petitioner.

I. COUNTERSTATEMENT OF THE CASE.

A. NATURE OF THE CASE.

This is an appeal from a jury verdict of guilty on the following charges: (1) Possession with Intent to Deliver a Controlled Substance, to-wit: Amphetamines on June 25, 1974; (2) Delivery of a Controlled Substance, to-wit: Amphetamines on June 25, 1974; (3) Possession with Intent to Deliver a Controlled Substance, to-wit: Amphetamines on June 28, 1974.

B. RESUME OF PLEADINGS AND PROCEDURE.

An Information was filed in Thurston County Superior Court on July 1, 1974, charging the appellant with Possession with Intent to Deliver a Controlled Substance, to-wit: Amphetamines on June 28, 1974. On July 2, 1974, a First Amended Information was filed in the Thurston County Superior Court charging the defendant in three counts as follows: Possession with Intent to Deliver a Controlled Substance, to-wit: Amphetamines on June 25, 1974; Delivery of a Controlled Substance, to-wit: Amphetamines on June 25, 1974; and Possession with Intent to Deliver a Controlled Substance, to-wit: Amphetamines on June 28, 1974.

On July 3, 1974, the defendant was arraigned on the First Amended Information and entered a plea of not guilty to all three counts as charged. On July 8, 1974, a jury trial was set by the Court for the week of August 19, 1974. On August 12, 1974, appellant moved for a continuance and waived the 60/90-day rule. Subsequently, trial was set for the week of November 18, 1974.

An omnibus hearing was set by the Court for August 28, 1974. At the time of the omnibus hearing, a motion to suppress evidence seized pursuant to a search warrant was made and the Court ruled the evidence seized pursuant to the search warrant to be admissible. On November 11, 1974, the jury trial was continued until February 3, 1975, by mutual agreement of counsel. On November 25, 1974, appellant moved for reconsideration of the Court's

previous ruling on the search and seizure issue and after hearing argument of counsel, the Motion for Reconsideration was denied. A jury was duly impaneled on February 3, 1975, and on February 4, 1975, the jury returned a verdict of guilty on all three counts as charged.

On April 14, 1975, a Motion for Arrest of Judgment, or in the alternative, for a new trial was argued on appellant's behalf, but was denied. On that same date, the defendant was sentenced to the Department of Institutions for not more than five (5) years on each of the three counts, said counts to run concurrently.

A Notice of Appeal was duly filed with the Thurston County Superior Court on April 14, 1975.

C. STATEMENT OF FACTS.

On June 27, 1974, Detective William Strand of the Thurston County Sheriff's Department typed a Complaint for Search Warrant (Plaintiff's Omnibus Exhibit 1) and brought it to Deputy Prosecuting Attorney Ed Schaller, Jr. for approval. The Complaint for Search Warrant read as follows:

> "That affiant's belief is based upon the following facts and circumstances: Information was transmitted to this officer by a confidential and reliable informant that he personally observed a controlled substance that was removed from the above named residence. At the time an

estimate of perhaps a thousand or more pills were in the residence. The informant is acquainted with drugs, both pharmaceutical type and illicit drugs. The informant is licensed as a pharmacist. The controlled substance is identified as meth anphetamine (Criss-Cross Speed). Further, it was noted that the suspect took a package that appeared to be some of the same type substance to his vehicle. The informant has in the past aided in the investigation of other cases that have resulted in the arrest and conviction of the persons in the cases. The informant will be used in the future in drug abuse cases."

Detective Strand was then advised by Deputy Prosecutor Schaller that he would have to advise the judge who was to issue the Search Warrant of certain additional information to supplement the written affidavit. (St. 2-5) Detective Strand then attempted to contact District Court Judge Frank Thorp, but was unable to reach him. Detective Strand then attempted to contact approximately four Pro Tem District Court Judges and finally reached Judge Pro Tem Ward Rathbone at a local restaurant. (St. 5)

When Detective Strand actually met Judge Pro Tem Ward Rathbone at the restaurant, he showed Mr. Rathbone the Complaint for Search Warrant and in addition to the written application, orally advised Judge Pro Tem Rathbone that he had received the

information contained on the Complaint for Search Warrant at approximately 6 p.m. that evening from an informant. Further, that the informant had knowledge of the drugs in Edwin O'Connor's residence. (St. 5-8) Detective Strand then orally told Judge Pro Tem Rathbone that there was another informant involved, but that he did not wish to include that individual on the affidavit. Detective Strand then produced a search warrant (Plaintiff's Omnibus Exhibit 2) for Judge Rathbone to sign. (St. 6-8)

Judge Pro Tem Ward Rathbone testified at the time of the omnibus hearing that he had been contacted at the Melting Pot Restaurant on the evening of June 27, 1974, at approximately 11 or 11:30 p.m. by Detective William Strand. Judge Pro Tem Rathbone further testified that he and Detective Strand went to a counter where the cash register was located in the Melting Pot Restaurant, administered an oath to Detective Strand, and that at that point he and Detective Strand discussed the contents of the affidavit. As a result of the discussion with Detective Strand, Judge Pro Tem Rathbone reached the conclusion that there were drugs in appellant's residence at the time of the issuance of the search warrant. (St. 12-14) Detective Strand then went to Apartment 102, El Rio Vista Apartments and served the search warrant. (St. 8)

After the search warrant had been signed by Judge Pro Tem Ward Rathbone, Detective William Strand contacted Detective K. C. Jones of the Tumwater Police Department and advised him that he had a

search warrant for Apartment 102 of the El Rio Vista Apartments in Tumwater, Washington. (St. 39) Detective Jones met with Detective Strand and they proceeded to appellant's residence where the door was opened by the apartment manager. Detective Jones observed on a coffee table directly in front of the front door a large quantity of small white pills which he suspected to be speed. On an end table on the other side of the room, Detective Jones observed another quantity of pills that appeared to be piled in 100-pill stacks. Detective Jones estimated that there were about sixty piles of these pills stacked up around the front room. Detective Jones then went into the kitchen area of the apartment and found another quantity of amphetamines. (St. 40) Detective Jones then took ,the suspected amphetamines to the Washington State Patrol Drug Control Assistance Unit Laboratory (St. 42) and Thomas Antos, a chemist, analyzed the pills and determined them to contain amphetamites. (St. 45-56 and St. 51)

Linda Roloff, an acquaintance of Edwin O'Connor, testified she purchased 100 amphetamines from O'Connor for the sum of $20.00 (St. 14-16) on June 25, 1974. (St. 27) The forensic chemist, Thomas Antos, testified that the tablets sold to Linda Roloff on June 25, 1974, contained amphetamines. (St. 51)

II. ARGUMENT IN ANSWER TO APPELLANT.

A. JUDGE PRO TEM WARD RATHBONE WAS INFORMED OF SUFFICIENT UNDERLYING CIRCUMSTANCES FROM WHICH THE

INFORMANT CONCLUDED THAT THE AMPHETAMINES WERE IN THE APPELLANT'S APARTMENT.

In State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967), the Court was faced with the issue of determining whether or not there was probable cause for the issuance of the search warrant. In so doing, the Court set down the following guidelines for its determination at pages 962 and 963:

> "In considering this contention it must be kept in mind that the question of whether probable cause justified the issuance of a search warrant should not be view in a hypertechnical manner. The United States Supreme Court emphasized this in United States v. Ventresca, 380 U.S. 102, 13 L. Ed. 2d 684, 85 Sup. Ct. 741 (1965), at 109:
>
> > When a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this

> area should be largely determined by the preference to be accorded to warrants. (Citing case.) (Italics ours.)

"In Aguilar v. Texas, 378 U.S. 108, 111, 12 L. Ed. 2d 723, 84 Sup. Ct. 1509 (1964), the Court explained:

> 'Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," ibid., and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present . . ."'"

The Walcott Court then went on to set forth the rule for testing the sufficiency of information furnished by unidentified informants at page 963:

> "The rule for testing the sufficiency of such information was stated in Aguilar, supra, at 114:

> '[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed,... was "credible" or his information "reliable"'"

The rules set forth in the State v. Walcott, supra, should be utilized in analyzing the Complaint for Search Warrant (Plaintiff's Omnibus Exhibit 1) typed by Detective Strand of the Thurston County Sheriff's Department (St. 3) and presented to Judge Pro Tem Ward Rathbone. (St. 13) In examining the Complaint for Search Warrant in a common-sense manner, it can be determined that the confidential reliable informant observed amphetamines in Apartment 102 of the El Rio Vista Apartments at 1275 South Second Avenue in Tumwater, Washington, and that the same type of amphetamines observed in the apartment were taken to appellant's vehicle. Additionally, Detective Strand told Judge Pro Tem Rathbone that he received the information from his confidential and reliable informant at approximately 6 p.m. on the evening of June 27, 1974, (St. 7) and Judge Pro Tem Rathbone testified that the search warrant was obtained by Detective Strand at approximately 11 or 11:30 p.m. on the evening of June 27, 1974. It cannot be overemphasized

that the Judge Pro Tem Rathbone, after having examined the written affidavit of Detective Strand and having discussed the written affidavit with Detective Strand, concluded that there were drugs in appellant's apartment at that time. (St. 14)

In State v. Harrison, 5 Wn. App. 454, P.2d 532 (1971), the appellant court was concerned with the issue of whether or not the affidavit in support of a search warrant established probable cause to believe interstate facilities were being used to conduct gambling operations. The Court held therein at page 458:

> "To rise to the level of probable cause, the courts consider only probablilities, and a prima facie showing of criminal activity is not required. Affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial and, in judging probable cause, issuing magistrates are not to be confined by restrictions on the use of good common sense. Their determination of probable cause should be paid great deference by reviewing courts. Spinelli v. United States, 393 U.S. 410 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969); State v. Barnes, 76 Wn.2d 234, 456 P.2d 337 (1969). Probable cause exists where 'the facts and circumstances within their [the arresting officers] knowledge and of which they had

> reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 288 (1925)."

Although Harrison was able to raise a number of questions that were not answered in detail in the affidavit in support of search warrant in his case, the Court held that there was no question about the reliability of the informer, as in the instant case. Further, there is sufficient information in the affidavit to indicate that the informant had seen the amphetamines in the apartment and similar amphetamines transferred from the apartment to O'Connor's vehicle.

B. THE USE OF ORAL INFORMATION FROM DETECTIVE WILLIAM STRAND BY JUDGE PRO TEM WARD RATHBONE IN THE ISSUANCE OF THE SEARCH WARRANT WAS PERMISSIBLE.

In State v. Malbeck, 69 Wn.2d 695, 419 P.2d 805 (1966), the Court was concerned with a case wherein a Deputy Sheriff was examined under oath by a Justice of the Peace who later issued a search warrant based in part upon the oral examination of the Deputy Sheriff. The Deputy Sheriff had presented an unsigned affidavit to the Justice of the Peace and never, in fact, signed the affidavit form. The Court held at page 697:

> "A signed affidavit for a search warrant is not required. The fourth amendment to the United States Constitution requires only that warrants issue upon probable cause supported by oath or affirmation. RCW 10.79.010 requires only that the application for a search warrant be under oath and the justice find reasonable cause for the officer's belief."

So both the Constitution of the United States and the RCW applicable at the time of the Malbeck case, required only that the application for the search warrant be under oath and that the Justice of the Peace find reasonable cause for the officer's belief.

In State v. Walcott, supra, the contention was made that the complaint or affidavit for a search warrant must show probable cause on its face before a search warrant can be issued. In response to this argument, the Court responded at page 967:

> "The defendant concedes that the law of this state requires only an oath or affirmation to support a find of probable cause. State v. Malbeck, 69 Wn.2d 695, 419 P.2d 805 (1966). He argues, however, that this state should follow the federal rule which requires that sworn statements in support of an application for a search warrant be reduced to writing.
>
> "Although the federal practice, which results in making and

> preserving a contemporaneous record of the proceedings before the magistrate, may be preferable; however, it is not a constitutional requirement under the Fourth Amendment. We adhere to our ruling in Malbeck and the cases cited therein."

And in State v. Smyth, 7 Wn. App. 50, 4999 P.2d 63 (1972), the Court was confronted with the same issue as was presented in State v. Walcott and State v. Malbeck. The Court held at page 52 in State v. Smyth:

> "The search warrant was based upon probable cause. While the affidavit itself is incomplete, Officer Bourdage went before the district judge and, under oath, gave oral information concerning probable cause. This is a proper procedure. There is no requirement that an officer's sworn statement before a magistrate be reduced to writing. State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967); State v. Malbeck, 69 Wn.2d 695, 419 P.2d 805 (1966).

JCrR 2.10(c), which was in effect at the time the search warrant in the instant case was issued, provides that a search warrant:

> "...shall issue only on an affidavit or affidavits establishing the grounds for issuing the warrant. Such affidavit

or affidavits may consist of an officer's sworn telephonic statement to the judge; provided, however, such sworn telephonic testimony must be electronically recorded by the judge on a recording device in the custody of the judge at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter. If the judge finds that probable cause for the issuance of a warrant exists, he shall issue a warrant or direct an individual whom he authorizes for such purposes to affix his signature to a warrant identifying the property and naming or describing the person, place or thing to be searched. The finding of probable cause shall be based on evidence, which may be hearsay in whole or in part provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce. The judge shall record a summary of any additional evidence on which he relies. The warrant shall be directed to any peace officer. It shall command the officer to search, within a specified period of time not to

> exceed 10 days, the person, place or thing named for the property specified. It shall designate a magistrate to whom it shall be returned. The warrant may be served at any time."

There is no provision under the justice court rule that requires that when a written affidavit is presented to a District Court Judge (Judge Pro Tem) that the conversation between the issuing magistrate and the affiant must be recorded. In retrospect, this would have definitely been preferable, but was not done since it was not required by the justice court criminal rule.

III. CONCLUSION.

It is respectfully submitted that appellant's conviction for the Possession with Intent to Deliver Amphetamines on June 25, 1974, in Count I, the defendant's conviction for Delivery of a Controlled Substance, to-wit: Amphetamines on June 25, 1974, in Count II, and the Possession of the Amphetamines with Intent to Deliver on June 28, 1974, in Count III should be affirmed.

Respectfully submitted,

PATRICK D. SUTHERLAND
Prosecuting Attorney

By: ED SCHALLER, JR.
Chief Deputy
Attorneys for Respondent

EXHIBIT A
IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,	)
	)
Respondent,	)
	)
vs.	)
	)
EDWIN J. O'CONNOR,	)
	)
Appellant.	)

NO. 1838-II
Division Two
Unpublished Opinion
Filed Feb 22 1977

REED, J. -- Defendant Edwin J. O'Connor appeals from his superior court convictions for: (1) possession of amphetamines with intent to deliver on June 25, 1974; (2) delivery of amphetamines on June 25, 1974, and (3) possession with intent to deliver amphetamines on June 28, 1974. We affirm.

On June 27, 1974, Detective William Strand of the Thurston County Sheriff's Department, met with a confidential and reliable informant, who told him that he had personally observed a controlled substance which had been removed from the residence of defendant O'Connor and that at that time he estimated there to be perhaps a thousand or more pills in the

residence. The informant also noted that the suspect, O'Connor, had taken a package of what appeared to be the same type substance to his vehicle. Detective Strand then typed a Complaint for Search Warrant, which contained substantially the same information he had received from the informant, and included the additional information that the informant was licensed as a pharmacist, was acquainted with both pharmaceutical and illicit drugs, had identified the controlled substance as methamphetamines ("crisscross speed"), had in the past aided in the investigation of other drug cases which resulted in convictions, and was currently being used as an informant in drug abuse cases.

After some attempts to locate a magistrate, the officer contacted District Court Judge Pro tem Ward Rathbone at a local restaurant late in the evening. Judge Rathbone administered an oath to Detective Strand, questioned him on the contents of the sworn affidavit, and concluded that there was probable cause to believe there were amphetamines in the residence of the suspect at the time. He accordingly issued a search warrant for O'Connor's residence. Detective Strand then proceeded to the suspect's address and conducted a search of the premises, finding and seizing an estimated 6,000 pills from a coffee table near the front door, and more pills from various other locations in the residence. Two suppression hearings were held, at which the existence of probable cause for issuance of the warrant was unsuccessfully attacked and the evidence was used to convict O'Connor at his subsequent trial.

The defendant has made two assignments of error, contending: (1) that the evidence should have been suppressed because (a) the affidavit for the search warrant did not satisfy constitutional standards, (b) the use of oral information to supplement the affidavit was improper, and (c) there was no justification for a nighttime search of the defendant's residence; and (2) that the jury was improperly instructed on the law of possession.

Turning to the issue of probable cause for the issuance of a search warrant, we first note that, although the affidavit is not a model of clarity, it does satisfy constitutional standards and meets the dual test of Aguilar v. Texas, 378 U.S. (1964). It sufficed to furnish probable cause to believe the pills were controlled substances; that they had been observed in the suspect's house in numbers estimated at over 1,000; and the suspect had been seen carrying a package which appeared to contain some of the pills to his automobile. The affidavit also contained information from which the issuing magistrate could determine the informant was credible and reliable; he had previously aided in the investigation of cases which resulted in convictions; he was still being used as an informant; and he was a licensed pharmacist. The affidavit clearly passes the test enunciated in State v. Harrison, 5 Wn. App. 454, 458, 488 P.2d 532 (1971).

Because we have found the affidavit established probable cause, we do not deem it necessary to address defendant's complaint that Officer Strand orally supplemented the affidavit in his discussions

with the issuing magistrate. Any error arising from a failure to record and reduce to writing this supplemental information pursuant to the provisions of JCrR 2.10(c) is not prejudicial because the added information would be mere surplusage to an otherwise valid affidavit.

We find no merit in defendant's allegation that there was no justification for serving the search warrant at 11:30 at night. Detective Strand received information from the informant at 6 p.m. on June 27. He immediately typed his Complaint for Search Warrant and attempted to locate a magistrate. After several unsuccessful attempts, he finally located Judge Rathbone in a restaurant at approximately 11 p.m. Upon receiving the search warrant from the judge, he proceeded immediately to the suspect's residence and carried out the search. At the time the search was actually carried out the suspect was not even home, and the police had to be let into the residence by the apartment manager. JCrR 2.10(c) and CrR 2.3(c) both specify that the "warrant may be served at any time" within 10 days of issuance. Moreover, it is obvious that Judge Rathbone, in signing the warrant at 11 p.m., knew that it might well be executed before daylight. There was no error in serving the warrant. See State v. Smith, 15 Wn. App. 716, 552 P.2d 1059 (1976).

When defendant failed to preserve error with regard to his contention that the court should not have given its instructions No. 11 and 13. Defendant failed to call to the trial judge's attention the deficiencies he now urges on appeal.

State v. Peterson, 73 Wn.2d 303, 438 P.2d 183 (1968); State v. Smith, 11 Wn. App. 216, 521 P.2d 1197 (1974). Nor has defendant complied with CAROA 43, which mandates that we not consider assignments directed to the sufficiency or insufficiency of instructions which are not set out in full in defendant's brief. Accordingly, even though we believe instruction No. 13 is a misstatement of the law and ought not to be given, we do not find it violates any constitutional right of the defendant in the context of this case and there is no ground for reversal.

Defendant assigns no error to the sufficiency of the evidence or the rulings of the trial court in connection with his conviction for delivering amphetamines on June 25, 1974; all assignments appear to be directed at the crimes of possession and particularly that of June 28, 1974.

The judgments are affirmed.

Pursuant to RCW 2.06.040 as amended by the Laws of 1971, ch. 41, § 1, this opinion will not be published.

/s/ REED, J.

WE CONCUR:

/s/ PEARSON, J.

/s/ PETRIE, C. J.

EXHIBIT B

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON, Respondent, vs. EDWIN J. O'CONNOR, Appellant.	)

NO. 1838-II

ORDER DENYING MOTION
FOR RECONSIDERATION

The court has considered this motion for reconsideration and has determined that it should be denied. Accordingly, it is

ORDERED that the motion is denied.

DATED this 23rd day of March, 1977.

/s/
CHIEF JUDGE

EXHIBIT C

THE SUPREME COURT OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

vs.

EDWIN J. O'CONNOR,

Appellant.

NO. 44886 (1838-II)

ORDER DENYING PETITION
FOR REVIEW

The Court having considered the petition for review of the decision of the Court of Appeals in this cause.

It is ordered that the petition be and it is hereby denied.

Dated this 29th day of September, 1977.

By the Court:

16 Wn. App. 1048

/s/
Chief Justice

EXHIBIT D

THURSTON COUNTY DISTRICT JUSTICE
COURT, THURSTON COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT
(Controlled Substances)

STATE OF WASHINGTON)
) ss. NO. _____
County of Thurston)

COMES NOW William Strand, who being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the State of Washington, controlled substances, as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises with Thurston County, Washington, designated and described as follows, to wit:

Apartment 102 of the El Rio Vista Apts. 1275 So. 2nd Ave. Tumwater Wash. Apartment occupied by ED O'CONNOR also a green Datsun pickup truck with Nev. lic.

That affiant's belief is based upon the following facts and circumstances:

Information was transmitted to this officer by a confidential and reliable informant that he personally observed a controlled substance that was removed from the above named residence. At the time an estimate of perhaps a thousand or more pills were in the residence. The informant is

acquainted with drugs both pharmaceutical type and illicit drugs. The informant is a licensed pharmacist. The controlled substance is identified as meth anphetamine (Criss-Cross Speed). Further it was noted that the suspect took a package that appeared to be some of the same type substance to his vehicle. The informant has in the past aided in the investigation of other cases that have resulted in the arrest and conviction of the persons involved in the cases. The informant will be used in the future in drug abuse cases.

/s/ William Strand

SUBSCRIBED AND SWORN TO before me this 27 day of June, 1974.

/s/ Ward Rathbone

RECEIVING OF COMPLAINT and ISSUANCE OF WARRANT APPROVED:

SMITH TROY, Prosecuting Attorney

by: /s/
Deputy Prosecuting Attorney